

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TWANIA POPLAR,

Plaintiff-Appellant,

v

JONATHAN C. HIRSCH and MINDELL,  
MALIN & KUTINSKY,

Defendants-Appellees.

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UNPUBLISHED

April 26, 2011

No. 296503

Genesee Circuit Court

LC No. 08-089809-NM

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff Twania Poplar appeals as of right. She challenges the trial court's order granting defendant Jonathan Hirsch's motion for summary disposition pursuant to MCR 2.116(C)(10). She also appeals the trial court's decision to deny her motion for reconsideration. We affirm.

**I. FACTS**

Poplar was injured in an alleged slip and fall incident at an apartment complex that Boyzie L. Mathis owned. Poplar hired Hirsch to represent her in the resulting claim against Mathis. In May 2005, Poplar filed a premises liability lawsuit against Mathis. However, Hirsch had difficulty locating Mathis in order to prove process. After several failed attempts to serve Mathis with the summons and complaint, the trial court issued an Order Allowing Substitute Service to Hirsch in September 2005. The order stated:

IT IS HEREBY ORDERED that service of process be made upon the Defendant, BOYZIE L. MATHIS, in a manner which is reasonably calculated to give said Defendant actual notice of the proceedings and an opportunity to be heard.

IT IS FURTHER ORDERED that substituted service be made in accordance with MCR 105 and 106, to serve Defendant, BOYZIE L. MATHIS, by posting at his/her last known address and by regular mail.

Hirsch purportedly served Mathis in September 2005, by posting at, and mailing to, an address in Atlanta, Georgia. Mathis did not respond. Hirsch requested a default, which the court clerk entered.

In December 2005, Hirsch moved for entry of a default judgment in the amount of \$500,000. In January 2006, the trial court held a hearing for the default judgment, which was attended by an attorney filling in for Hirsch. There was no representative for Mathis at the hearing. Following the hearing, the trial court signed an order for entry of a default judgment in the amount of \$300,000.

Hirsch then failed to file the default judgment with the court clerk. On January 24, 2006, the trial court issued to Hirsch a notice to appear, advising him that he needed to file the default judgment by February 6, 2006, or the case would be dismissed. Hirsch did not file the default judgment, and the case was dismissed on February 8, 2006.

Poplar, represented by new counsel, filed a motion to re-open the case against Mathis and enter the judgment. Mathis filed an answer and stated that he had never been served with the summons and complaint, that the method of substitute service was not sufficient to give him notice of the pending action, that he never had notice of the default as required by MCR 2.603(A)(2), and that he was never served with notice of the hearing on the motion for entry of the default judgment, as required by MCR 2.603(B)(1). Mathis stated that he first received notice of the action when he received a copy of a motion for appointment of a receiver. Mathis moved the trial court to set aside the default judgment. He supported his motion with affidavits concerning his address and lack of notice of the action.

The trial court held a hearing and subsequently denied Poplar's motion to re-open the case and enter judgment in the underlying action. Poplar did not appeal this decision.

Poplar then filed this action for legal malpractice against Hirsch. Poplar alleged that Hirsch violated his duties to her by failing to file the default judgment, by failing to advise her of the status of her case, by failing to defend the judgment when it was "collaterally attacked," and by abandoning her case.

Hirsch moved for summary disposition pursuant to MCR 2.116(C)(10). He argued that even if he had properly served Mathis, Poplar would not have been able to prevail on the premises liability suit because she could not identify a defect that caused her to fall. Poplar responded that she did not have to prove the merits of the premises liability case because her malpractice claim was that Hirsch was negligent because he failed to file the default judgment. She argued that the underlying action was successful because the trial court issued a default judgment.

In reply, Hirsch argued that there was no causal link between any alleged malpractice and Poplar's damages. He argued that Poplar did not suffer any damages when he did not file the judgment because the judgment was worthless. Hirsch contended that the judgment was worthless because it could have been set aside on the basis of deficient service to Mathis. He also argued that the lost opportunity for Poplar to argue her slip and fall claim was immaterial because the claim was worthless. Poplar argued that the substituted service to Mathis was valid.

She argued that Hirsch was “judicially estopped” from disputing the service because Hirsch had stated, under oath, that he had properly served Mathis with process.

The trial court granted Hirsch’s motion for summary disposition. The trial court stated:

The Court doesn’t believe that the plaintiff in this case, properly, obtained jurisdiction over Boyzie Mathis. Now I realize I didn’t litigate that fully, because at the time things had gone way too far. But in any event, he wasn’t served with any process prior to the entry of judgment. And had he sought to have the judgment set aside by default or judgment itself for lack of service, I would’ve had to grant that motion. And in addition, another reason has been raised that apparently the complaint would not survive summary disposition in any event based on the fact that there was no identifiable hazard in the doctrine of open and obvious as well. So I’m gonna [sic] grant your motion.

Poplar filed a motion for reconsideration. The trial court denied the motion. It reasoned that Poplar could not show that she was damaged by Hirsch failing to file the judgment because she could not show that she would have been successful in the underlying action. Poplar now appeals.

## II. LEGAL MALPRACTICE

### A. STANDARD OF REVIEW

Poplar contends that the trial court erred when it granted Hirsch’s motion for summary disposition regarding her claim of attorney malpractice. “A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.”<sup>1</sup> A trial court’s decision to grant summary disposition is a question of law which this Court reviews de novo.<sup>2</sup> Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law.”<sup>3</sup>

### B. LEGAL STANDARDS

A claim of legal malpractice requires Poplar to prove “(1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged.”<sup>4</sup> “As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must

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<sup>1</sup> *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

<sup>2</sup> *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

<sup>3</sup> MCR 2.116(C)(10).

<sup>4</sup> *Coble v Green*, 271 Mich App 382, 386; 722 NW2d 898 (2006).

establish that the defendant's action was a cause in fact of the claimed injury.”<sup>5</sup> “Hence, a plaintiff must show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit.”<sup>6</sup>

### C. APPLYING THE LEGAL STANDARDS

Poplar contends that the issue of whether Mathis could have obtained relief from the default judgment, had it been entered, was not properly before the trial court, and that the trial court made impermissible findings of fact when it granted Hirsch's motion. We disagree.

Contrary to Poplar's contention, the issue of whether the default judgment would have been vulnerable to an attack was properly an issue for the court to decide in this malpractice action. An essential element in this legal malpractice action is whether Hirsch's alleged negligence was a cause in fact of Poplar's injury.<sup>7</sup> The trial court examined whether the default judgment would have been subject to attack to determine whether Poplar was injured from Hirsch's failure to file the default. The inquiry whether the default judgment was vulnerable to attack is comparable to the analysis a court undertakes in an appellate legal malpractice action to evaluate the likelihood of success in an appeal. Just as that determination is an issue for the trial court to decide,<sup>8</sup> the issue of whether a default judgment would have been vulnerable to an attack was properly an issue so the trial court could decide whether Hirsch's alleged negligence was a cause in fact of any injury to Poplar.

To some extent, Poplar takes issue with the trial court's determination that Mathis could have successfully challenged and vacated the default judgment, had it been entered. She contends that the service was valid because Hirsch complied with the trial court's order allowing substituted service in the underlying action. She argues that Hirsch's compliance with the order precluded him from later contesting the sufficiency of service.

Defects in service of process may deprive a court of personal jurisdiction over a defendant, and absence of personal jurisdiction is a basis for vacating a default judgment.<sup>9</sup> Further, this Court has stated that a lack of actual notice can be sufficient to set aside a default judgment.<sup>10</sup>

In the underlying case, the trial court entered an order allowing substituted service “in accordance with MCR [2.]105 and [2.]106 . . . by posting at his/her last known address and by

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<sup>5</sup> *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

<sup>6</sup> *Id.* (internal quotations omitted).

<sup>7</sup> *Coble*, 271 Mich App at 386.

<sup>8</sup> *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592; 513 NW2d 773 (1994).

<sup>9</sup> *Dogan v Mich Basic Prop Ins Ass'n*, 130 Mich App 313, 320; 343 NW2d 532 (1983).

<sup>10</sup> *Nat'l Car Rental v S & D Leasing Inc*, 89 Mich App 364, 370; 280 NW2d 529 (1979).

regular mail.” In his affidavit in support of his request for entry of a default judgment, Hirsch stated that it appeared from the proofs of service filed in that action that Mathis was served in compliance with the order for substituted service. One proof of service indicated that a summons and complaint and other documents were posted at a specified address in Atlanta, Georgia. A second proof of service indicated that the documents were mailed to the same address.

However, in both the underlying case and in this case, evidence was presented that Mathis did not receive a copy of the summons and complaint, notice of the default, or any other pleadings in the underlying action, except for a copy of a motion for appointment of a receiver. According to Mathis, the receipt of that motion was his first notice of the underlying lawsuit. Mathis further stated that he never lived at the address in Atlanta and, although his son had previously lived at that address, he was not living there at the time of the alleged service. The trial court determined that this evidence was sufficient to show that service in the underlying action was defective, thereby depriving the court of personal jurisdiction over Mathis. As a result, Mathis likely could have successfully challenged the default judgment if the trial court entered it.

Poplar does not offer any reason why the trial court’s determination that service was defective should be considered erroneous. She simply asserts that service should be valid because Hirsch complied with the order for substituted service. Poplar does not argue that the trial court in the underlying action would have been prevented from setting aside the judgment for lack of jurisdiction because Mathis did not receive sufficient notice. As previously indicated, it was not improper for the trial court to examine the validity of the service in the underlying action in order to determine whether Hirsch was negligent for failing to enter the default judgment.

Poplar also contends that Hirsch should not be allowed to argue that the service was insufficient in this case when he previously stated that it was sufficient in the underlying action. In the underlying action, Hirsch represented that his service to Mathis was sufficient because it conformed to the trial court’s Order Allowing Substitute Service. But in this action, Hirsch contends that the service was not sufficient, so the judgment was worthless. Accordingly, Poplar contends that Hirsch should be “estopped” from arguing that the service in the underlying action was insufficient. However, Poplar fails to support her contention. She does not address any of the requirements to support her claim that Hirsch should be judicially estopped from arguing that the service was insufficient.<sup>11</sup> And it is not this Court’s obligation to discover and rationalize the basis for her claims.<sup>12</sup>

In sum, Poplar cannot carry her burden of showing that if Hirsch would have filed the judgment, she would have been able to collect from Mathis.

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<sup>11</sup> See *Opland v Kiesgan*, 234 Mich App 352, 362-365; 594 NW2d 505 (1999).

<sup>12</sup> *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Poplar also asserts that the trial court erred when it denied her motion for reconsideration, but she merely presents the same substantive arguments that she makes in challenging the trial court's order granting Hirsch's motion for summary disposition. Poplar still failed to show that "but for" Hirsch's malpractice, she would have been successful in her suit against Mathis. But even if Hirsch had filed the judgment, Mathis likely would have been successful in setting it aside because he never had notice of it, or even the complaint for that matter. Having previously rejected those arguments, we likewise conclude that the trial court did not err in denying Poplar's motion for reconsideration.

We affirm.

/s/ Jane M. Beckering  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly